

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6

JAY W. HITZROTH,
Appellant,
v.
WASHINGTON STATE PATROL,
Respondent.

)
) Case No. DISM-98-0065
)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD
)
)
)
)
)

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair, and GERALD L. MORGEN, Vice Chair. The hearing was held in the Project Development Conference Room at the Department of Transportation in Union Gap, Washington, on December 21 and 22, 1999. NATHAN S. FORD JR., Member, did not participate in the hearing or in the decision in this matter.

1.2 **Appearances.** Appellant Jay W. Hitzroth was present and was represented by Janet Taylor, Legal Intern, and Richard Q. Quigley, Attorney at Law of Liebler, Ivey and Connor, P.S. Respondent Washington State Patrol (WSP) was represented by Mitchel R. Sachs, Assistant Attorney General.

1.3 **Nature of Appeal.** Appellant was dismissed from his Commercial Vehicle Enforcement Officer 3 position for gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Respondent alleged that Appellant was discourteous; used vulgar, offensive language; failed to control his temper; showed prejudice concerning race,

sex, national origin, lifestyle and personal characteristics of others; exceeded his work authority; and attempted to influence a witness during the investigation into his misconduct.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999).

II. MOTION

2.1 On November 22, 1999, Appellant filed a Motion for Orders to Compel Discovery; Continue Hearing Date Not More Than 45 Days and for Order Certifying Issue of Sanctions to Superior Court.

2.2 On November 29, 1999, the Board heard oral argument on Appellant's Motion.

2.3 Appellant argued that he served Respondent with discovery requests on September 21, 1999, that he had spoken with Respondent's Assistant Attorney General on numerous occasions about the discovery requests, and that he had granted Respondent's requests for extensions of time regarding responses to the requests. Appellant contended that despite his communications with Respondent, the information requested was not produced. Appellant asserted that he was requesting information that was reasonably calculated to lead to relevant or admissible evidence and that Respondent was required to produce full and complete responses to his requests. Appellant further contended that Respondent's objection that the discovery requests might be over burdensome was based purely on speculation and was not supported by any facts. Appellant further argued that because he had not received complete responses to his discovery requests, a continuance was necessary to allow him to

1 obtain the information and to prepare for his hearing. In addition, Appellant argued that the matter
2 should be certified to Superior Court for sanctions.

3
4 2.4 Respondent argued that Appellant's motion should be denied. Respondent contended that
5 WSP produced responses to Appellant's discovery requests on October 28, 1999, and supplemented
6 its responses on November 19, 1999. Respondent further contended that WSP was not legally
7 required to produce the information Appellant was continuing to request. Therefore, Respondent
8 asserted that WSP complied with its discovery obligations and that Appellant's motion should be
9 denied. Respondent further argued that Appellant's request to certify the record for sanctions was
10 premature and should be denied, and that Appellant's request for a continuance was not based on
11 good cause and should be denied or if a continuance was granted, damages should be stayed.

12
13 2.5 The Board issued an oral ruling denying Appellant's motions. We now confirm our oral
14 ruling. Respondent stated that WSP provided Appellant with responses to his requests. Appellant
15 provided no persuasive argument to support his contention that WSP did not comply with its
16 discovery obligations or that more information was necessary in order for him to prepare for his
17 hearing. Therefore, Appellant's motion to compel was denied. Because Appellant's motion to
18 compel was denied, there was no basis for granting his request for a continuance. Furthermore,
19 because the Board denied Appellant's motion to compel, his motion to certify the issue to Superior
20 Court was moot.

21 22 **III. FINDINGS OF FACT**

23 3.1 Appellant Jay W. Hitzroth was a Commercial Vehicle Enforcement Officer (CVEO) 3 and a
24 permanent employee of Respondent Washington State Patrol (WSP) at the Plymouth Port of Entry.
25 Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated

1 thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals
2 Board on November 20, 1998.

3
4 3.2 By letter dated October 8, 1998, Respondent notified Appellant of his termination, effective
5 October 23, 1998. Respondent charged Appellant with gross misconduct and willful violation of
6 published employing agency or department of personnel rules or regulations. Respondent alleged
7 that Appellant failed to obey WSP's rules and regulations, failed to treat others with courtesy and
8 respect, exceeded his authority as a CVEO, and was untruthful during the investigation of his
9 alleged misconduct. Specifically, Respondent alleged that Appellant's "consistent use of profanity,
10 derogatory and racial comments and slang terms" constituted gross misconduct and violated WSP's
11 "policies regarding conduct, ethics, courtesy and discrimination/harassment." In addition,
12 Respondent alleged that Appellant exceeded his authority when he stopped two trucks for speeding
13 and when he co-signed the speeding citation issued to one of the trucks, and that Appellant
14 attempted to influence a possible witness during the WSP's investigation into Appellant's
15 misconduct.

16
17 3.3 Appellant was employed with Respondent for more than 12 years. He was promoted to a
18 CVEO 3 in April 1995. Prior to his promotion, he took a Supervisory Challenge Course that was
19 offered as a correspondence course through the State Patrol Academy and he attended Management
20 Core Phase One training offered through the Education and Training Division of the Department of
21 Personnel. Although Appellant's Performance Evaluations for the years encompassing November
22 8, 1995 through November 7, 1997, recommended that Appellant seek training to enhance his
23 supervisory skills, Appellant did not do so.

1 3.4 As a CVEO, Appellant was expected to abide by the WSP policies and regulations.
2 Appellant was aware of this expectation and was aware of the WSP policies and regulations. WSP
3 policies prohibit conduct that is unbecoming and discrimination/harassment, require staff to treat
4 others with courtesy and respect, and hold staff to the highest possible standards of ethical
5 responsibilities. WSP also has policies concerning Special Appointments and Special Orders;
6 prohibiting public criticism of orders, policies, other employees or the department; and prohibiting
7 interference with the disciplinary process.

8
9 3.5 As a CVEO 3, Appellant was the supervisor for classified employees at the Plymouth Port
10 of Entry and was responsible for the efficient operation of the Port of Entry. Appellant worked
11 directly with staff and the public and while he was the supervisor of the Plymouth Port of Entry,
12 productivity at the port increased. As a CVEO 3, Appellant had limited authority to stop vehicles
13 and issue citations.

14
15 3.6 The WSP Administrative Investigation Manual provides guidance for the internal
16 adjudication of allegations of misconduct. The manual includes a chapter on the WSP Early
17 Identification System (EIS). The EIS is designed to detect “out-of-the ordinary” patterns of
18 behavior resulting from job stress or other job-related problems.

19
20 *Use of derogatory comments and profanity.*

21 3.7 Appellant admits to much of the alleged misconduct. Appellant admits that he made
22 derogatory racial comments about truck drivers, that he might have made comments such as “the
23 dumb Mexican” or “spick,” that he probably referred to truck drivers as “stupid fucking truck
24 drivers,” that he referred to blacks as “niggers,” “dumb niggers,” and as “fucking niggers,” that he

1 referred to people from India as “rag heads,” that when he saw a heavy set female truck driver, he
2 moo’d like a cow, and that he referred to heavy set females as “porky.”

3
4 3.8 In addition, Appellant admits that he used “run of the mill” profanity at work including
5 words such as “God damn it,” “hell,” “fuck,” “shit,” “son of a bitch,” asshole,” and “bullshit.”
6 Appellant admits that he may have used such language on a daily basis. Appellant also admits that
7 he might have used such language in front of truck drivers.

8
9 3.9 Appellant admits that it is not appropriate to make derogatory racial comments or use
10 profanity in the workplace and that when he made such comments, he failed to lead by example.

11
12 3.10 Shortly after Appellant began working at the Plymouth Port of Entry, several of his
13 subordinates approached him and informed him that his comments were offensive and were not
14 appropriate. Appellant agreed to refrain from making inappropriate comments, but after about a
15 month, he resumed his former behavior.

16
17 3.11 Appellant attended cultural diversity training on October 22, 1996 and on May 14, 1996 and
18 harassment awareness training on June 17, 1992. Appellant admits that the training taught him to
19 treat people as equals, that he should not discriminate against people and that he should care about
20 people’s feelings. Appellant admits that he failed to comply with the training and admits that if
21 members of the public had heard his comments, the public’s confidence in the department could
22 have been undermined.

23
24 3.12 The credible testimony establishes that on one occasion when a non-English speaking
25 Hispanic truck driver and his companion were conducting business at the Plymouth Port of Entry,

1 Appellant commented to the effect that “the driver should be picking the potatoes rather than
2 driving the truck.” This comment was made in the presence of the driver and his companion. The
3 credible testimony also establishes that on one occasion when a heavy-set female truck driver was
4 conducting business in the scale house at the Plymouth Port of Entry, Appellant asked, in a voice
5 loud enough to be heard by the driver, “what happened to the fat cow?” The credible testimony
6 further establishes that Appellant referred to the wife of a co-worker in a derogatory manner and
7 that he made disrespectful, derogatory comments about his supervisor, Lieutenant David Trunkey,
8 in front of his subordinates.

9
10 *Speeding citations.*

11 3.13 On August 19, 1997, Appellant observed a truck speeding on Interstate 82. Because the
12 truck was speeding, Appellant stopped the truck under the guise of checking the driver’s logbook
13 and conducting a cursory safety check of the truck. In order to stop the truck, Appellant was
14 required to exceed the posted speed limit. When Appellant approached the driver, the driver
15 admitted that he was driving a little too fast. Appellant had already contacted Trooper James
16 Saunders and reported the speeding truck. Trooper Saunders responded to the site, talked to
17 Appellant, and based on the information provided by Appellant, issued a speeding citation to the
18 truck driver.

19
20 3.14 On February 5, 1998, Appellant observed another truck speeding on Interstate 82. The truck
21 turned onto State Route 395 and continued to exceed the posted speed limit. Appellant contacted
22 Trooper Reynaldo Gomez and reported the speeding truck. While Trooper Gomez was in route to
23 the site, Appellant stopped the truck. Appellant checked the driver’s paperwork and conducted a
24 cursory safety check of the truck. When Trooper Gomez arrived, Trooper Gomez wrote the truck
25
26

1 driver a speeding citation and asked Appellant if he would like to co-sign the citation. Appellant
2 agreed, co-signed the citation, and then left the area.

3
4 3.15 CVEOs are prohibited by Special Orders from stopping trucks for speeding. CVEOs do not
5 have the authority to issue speeding citations. Appellant admits that the trucks caught his attention
6 because of their speed. Furthermore, the credible testimony and evidence establishes that Appellant
7 exceeded the speed limit and “paced” the trucks prior to stopping them.

8
9 *Intimidation of staff and potential witnesses.*

10 3.16 As the supervisor of the Plymouth Port of Entry, Appellant was responsible for scheduling
11 staff to run the port. When employees called in sick, Appellant was required to adjust schedules to
12 provide coverage for the port. Appellant shared his personal opinion with his staff that they needed
13 to be more loyal to the patrol and that if an employee’s family member was home sick, somebody
14 other than the employee should stay home to take care of the sick person. While Appellant’s
15 subordinates felt discouraged from requesting leave, Appellant always authorized sick leave when it
16 was requested.

17
18 3.17 In discussions with subordinate staff, Appellant suggested that he and his supervisor,
19 Lieutenant David Trunkey, whom he referred to as “Old Baldy,” had a close relationship and were
20 friends. As a result, Appellant’s subordinates were reluctant to approach Appellant’s supervisor
21 with their concerns about Appellant’s behavior in the work place. In addition, in front of his
22 subordinates, Appellant publicly disagreed with and criticized some of Lt. Trunkey’s orders.
23 Appellant’s behavior was disrespectful and had the effect of appearing to undermine Lt. Trunkey’s
24 authority.

1 3.18 David Robinson and Dennis Gaffey were CVEOs at the Plymouth Port of Entry. Appellant
2 was their supervisor. When CVEO Robinson and CVEO Gaffey determined that Appellant's
3 behavior was intolerable, they contacted the Office of Professional Standards (OPS) for guidance on
4 how to proceed. OPS instructed them to follow the chain of command. They then met with Lt.
5 Trunkey and shared their concerns. Lt. Trunkey reported the matter to his superiors and the
6 investigation was turned over to the OPS for an internal investigation.

7
8 *Influencing a witness*

9 3.19 In 1986 or 1987, Appellant and CVEO Willi King were co-workers for WSP. During this
10 time, Appellant and Mr. King joked about Mr. King, an African-American, sitting outside of a
11 weigh station eating watermelon. Appellant related this story to others at the Plymouth Port of
12 Entry. Mr. King was promoted to a CVEO 2 on April 9, 1998. Appellant commented about his
13 opinion of Mr. King's inability to complete the paperwork required of the CVEO 2 position.

14
15 3.20 Appellant had been given notice of the charges against him and he knew that the comments
16 he had made about Mr. King might be raised during the investigation. On April 9, 1998, Appellant
17 called Mr. King. According to Appellant, he and Mr. King were friends and he called Mr. King to
18 congratulate him on his promotion and to tell him that he might be contacted by the OPS about the
19 investigation into Appellant's alleged misconduct. According to Mr. King, he and Appellant were
20 not friends and had not spoken in over two years. Furthermore, Mr. King stated that Appellant did
21 not congratulate him on his promotion, but rather talked to him about the OPS investigation.
22 Regardless of the reason why Appellant called Mr. King, Appellant knew that Mr. King would
23 probably be contacted during the OPS investigation process. WSP policies prohibit employees
24 from attempting to exert any influence on any participant in a disciplinary process.

1 *Untruthfulness*

2 3.21 WSP policies require employees to truthfully answer all questions related to the scope of
3 employment and operation of the department. Respondent has provided credible testimony that
4 establishes Appellant was untruthful during the OPS investigation process. For example, more
5 likely than not, Appellant stopped the two trucks because they were speeding, not because he
6 wanted to check their paperwork or conduct a safety check, and more likely than not, he called Mr.
7 King for the purpose of talking to him about the investigation rather than congratulating him on his
8 promotion. The credible testimony establishes that Appellant was evasive, deceptive and untruthful
9 in responding to questions during the OPS investigation process.

10
11 3.22 Captain David Karnitz is the District Commander for the Yakima District of the WSP and
12 was Appellant's appointing authority. When OPS completed the investigation into Appellant's
13 alleged misconduct, the matter was forwarded to Capt. Karnitz. Capt. Karnitz reviewed the case
14 file and determined that disciplinary action was warranted. Capt. Karnitz provided Appellant with
15 the case file, gave him notice of all the allegations, including the allegation that Appellant had been
16 untruthful during the investigation, and conducted a pre-disciplinary hearing to give Appellant an
17 opportunity to respond to the allegations.

18
19 3.23 Prior to determining the appropriate level of discipline, Capt. Karnitz reviewed the entire
20 file, considered the information Appellant provided during the pre-disciplinary hearing, and
21 reviewed Appellant's employment history. Capt. Karnitz concluded that the allegations were
22 proven; that Appellant's behavior was unacceptable, was consistent, ongoing and pervasive, and
23 was not likely to improve; and that Appellant created a liability for the agency. Capt. Karnitz found
24 that Appellant's behavior undermined the morale of the employees, interfered with the disciplinary
25 process, violated WSP policies and regulations, and created an intolerable work environment. After

1 consideration of Appellant's tenure with WSP, Capt. Karnitz determined that termination was the
2 only sanction that would prevent Appellant's continued misconduct.

4 **IV. ARGUMENTS OF THE PARTIES**

5 4.1 Respondent argues that Appellant engaged in a pervasive, flagrant, on-going pattern of
6 misconduct that created a hostile work environment for the employees at the Plymouth Port of
7 Entry. Respondent contends that Appellant had been properly trained and as a long-term employee,
8 he should have known that his behavior was unacceptable and contrary to WSP policies and
9 regulations. Respondent acknowledges that the WSP Early Identification System is designed to
10 discover potential problems, but argues that in this case, the problems already existed so the system
11 was not an appropriate tool to use to address Appellant's misconduct. Respondent argues that
12 Appellant's behavior was contrary to the standard of professional conduct expected of WSP
13 employees and that it was contrary to every standard of common sense and decency. Respondent
14 asserts that misconduct by others does not mitigate the seriousness or egregious nature of
15 Appellant's misconduct. Respondent contends that if the pre-existing culture at the port tolerated
16 the use of profanity, as the supervisor, it was Appellant's responsibility to correct that problem, not
17 to condone and exacerbate the problem. Respondent argues that the agency has met its burden of
18 proving that the misconduct described in the disciplinary letter occurred and that the sanction of
19 dismissal was appropriate.

20
21 4.2 Appellant admits that he engaged in a few isolated incidents of poor judgment in front of his
22 co-workers and subordinates, but denies making any racial comments or using profanity in front of
23 truck drivers or members of the public. Appellant argues that when he became the supervisor at the
24 Plymouth Port of Entry, he came into a pre-existing culture where the use of profanity was
25 acceptable behavior. Appellant contends that his behavior was a result of his attempt to establish a
26

1 rapport with his subordinates. Appellant further contends that his comments were meant as jokes.
2 Appellant asserts that in light of his unblemished work history and the lack of supervisory training
3 afforded to him, the sanction of dismissal is unreasonable and unequal. Appellant contends that
4 Respondent failed to follow its internal procedures to identify and remediate problems, that he
5 should have been afforded assistance through the agency's Early Identification System and that he
6 should have been given an opportunity to correct his behavior. In addition, Appellant asserts that
7 he never denied staff the use of sick leave, that he did not exceed his authority when he stopped the
8 speeding trucks, that he did not attempt to undermine Lt. Trunkey's authority, that he never
9 attempted to intimidate his subordinates, and that he did not attempt to influence Mr. King.

10 11 **V. CONCLUSIONS OF LAW**

12 5.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
13 herein.

14
15 5.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
16 the charges upon which the action was initiated by proving by a preponderance of the credible
17 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
18 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
19 Corrections, PAB No. D82-084 (1983).

20
21 5.3 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
22 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

23
24 5.4 Willful violation of published employing agency or institution or Personnel Resources
25 Board rules or regulations is established by facts showing the existence and publication of the rules

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &
3 Health Services, PAB No. D93-053 (1994).

4
5 5.5 In Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999), we addressed
6 misconduct of a nature similar to that presented here. In Schley we concluded that the appellant
7 had made offensive, inappropriate comments that could reasonably be perceived to be racially
8 motivated and that while appellant was entitled to have his own opinions, it was not appropriate for
9 him to voice his opinions in the workplace when those opinions could offend others. We further
10 concluded that the egregious nature of appellant's comments warranted dismissal, that appellant's
11 admitted comments alone were offensive, inappropriate, and racial in nature, and that such conduct
12 in the work place should not be tolerated. In Schley, we upheld dismissal of the appellant.

13
14 5.6 Here, Respondent has met its burden of proving by a preponderance of the credible evidence
15 that Appellant repeatedly made derogatory racial comments and used profanity. Such conduct
16 cannot be tolerated in the workplace. Appellant failed to lead by example and to be a positive,
17 professional role model for his subordinates.

18
19 5.7 Appellant was put on notice by his subordinates that his behavior was offensive, yet he
20 continued to engage in a pattern of behavior that included the excessive use of inappropriate
21 language. There is no evidence that Appellant's behavior resulted from job stress or other job-
22 related problems. Therefore, WSP was not obligated to assist Appellant in correcting his behavior
23 through the Early Identification System. While Appellant has acknowledged responsibility for
24 some of his misconduct, this does not excuse or mitigate the seriousness of his actions. In addition,
25 misconduct by others does not excuse or mitigate the seriousness of Appellant's misconduct.

1
2 5.8 Furthermore, a preponderance of the credible evidence proves that Appellant created a
3 hostile, intimidating work environment, that he contacted a potential witness during the
4 investigation into Appellant's alleged misconduct which could have influenced the witness's
5 perception of their past interaction, that he was evasive during the investigation process, and that he
6 exceeded his authority by co-signing a speeding citation.

7
8 5.9 Here, as in Schley, Respondent has met its burden of proving the charges in the disciplinary
9 letter. However, based on Appellant's admitted behavior alone, the sanction of dismissal is
10 appropriate. Appellant's admitted behavior violates all standards of common sense and decency,
11 violates WSP's policies and regulations, and rises to the level of gross misconduct. Under the
12 proven facts and circumstances of this case and in light of the egregious and perverse nature of
13 Appellant's misconduct, the sanction of dismissal is appropriate. The appeal should be denied.

14
15 **VI. ORDER**

16 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Jay W. Hitzroth is denied.

17 DATED this _____ day of _____ 2000.

18 WASHINGTON STATE PERSONNEL APPEALS BOARD

19
20 _____
21 Walter T. Hubbard, Chair

22
23 _____
24 Gerald L. Morgen, Vice Chair

25
26 Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504